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Papers

Relationships of Representation in Voting Rights Act Jurisprudence

Kathryn Abrams*

In the historical narrative *Praying for Sheetrock*,¹ Melissa Faye Greene recounts the political awakening of the black citizens of McIntosh County, Georgia. For these citizens, disenfranchised and lulled by the providence of a feudal sheriff, one era came to an end with the election of the first independent black county commissioner, Thurnell Alston.² Yet at the same time, a second political era was beginning: one that challenged Commissioner Alston's integrity and threatened to undermine the influence of his hard-won victory.³

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1. MELISSA F. GREENE, *PRAYING FOR SHEETROCK* (1991).

2. Prior to the election of Alston, McIntosh County politics were dominated by a machine headed by Sheriff Tom Poppell. This machine had occasionally selected and supported black candidates, who had then won. Alston was the first black candidate to run independently of—indeed, in opposition to—Poppell's machine, and prevail. This victory was facilitated by the court-ordered division of the city and county into single-member districts. *See id.* at 209-32.

3. As a county commissioner, Alston was subject to frequent invitations to use his public office for private gain. As a black commissioner, and self-described burr in the sides of his white colleagues, Alston was closely watched for evidence of corruption. He was ultimately brought down by a sting operation of the Georgia Bureau of Investigation and the FBI, in the course of which he accepted bribes from an undercover agent posing as an entrepreneur (and drug dealer) who hoped to obtain a liquor license to open a bar in the county. The operation had been initiated when a low-level drug dealer, as

As in latter-day McIntosh County, the Voting Rights Act⁴ has entered a new era of enforcement. The paradigmatic context—that of legislative elections—has been litigated consistently enough to have produced a standard judicial interpretation: the Voting Rights Act secures minority voters' right to "elect the candidates of their choice," usually through the instrumentality of supermajority districts.⁵ The next era promises challenges to that instrumentality:⁶ the Court's opinion in *Shaw v. Reno*⁷ invokes an increasingly abstract, de-contextualized equal protection doctrine to challenge districts whose unusual shape suggests race-conscious decisionmaking.⁸ As the breadth of *Shaw*'s challenge to the legislatively

part of a plea bargain, had cited Alston as a local official who could be bought. Alston was sentenced to more than six years in a federal prison camp. *Id.* at 270-325.

4. Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973ff-6 (1988). Section 2 of the Voting Rights Act guarantees to members of a protected class of citizens who may have fewer opportunities than other members of the electorate the "opportunity . . . to participate in the political process and to elect representatives of their choice." *Id.* § 1973. Section 5 requires preclearance of changes in voting qualifications or standards. *Id.* § 1973c.

5. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 74 (1986) (holding that the Voting Rights Act prohibited the use of multimember districts in certain North Carolina counties); *Ketchum v. Byrne*, 740 F.2d 1398, 1413 (7th Cir. 1984) (holding that the district court abused its discretion by not considering, among other things, the use of supermajorities in structuring its redistricting plan), *cert. denied sub nom.* *City Council of Chicago v. Ketchum*, 471 U.S. 1135 (1985). These cases implement the dominant interpretation in the Section 2 context. But it is generally understood that Section 2 and Section 5 protect similar electoral and participatory norms. *See Chisom v. Roemer*, 111 S. Ct. 2354, 2367 (1991) (noting that there is a "close connection between § 2 and § 5" as evidenced by the fact that "Section 5 uses language similar to that of § 2 in defining prohibited practices").

6. For pre-*Shaw* challenges to the electoral emphasis and supermajority remedy increasingly associated with Section 2 cases, see Kathryn Abrams, *Raising Politics Up: Minority Vote Dilution and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449 (1988) (arguing that electoral focus and supermajority remedy may interfere with interracial political interaction and coalition building in an extended political process); Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991) (arguing that electoral focus and supermajority remedy may facilitate displacement of racist tactics to the legislative arena and may not advance substantive policy interests of black voters). Guinier also uses the term "second generation" problems, but uses it in a different sense than I do below.

7. 113 S. Ct. 2816 (1993). This symposium was held, and these papers written, many months before the Court handed down its decision in *Shaw*. Had it been otherwise, there is little doubt that many of us would have chosen that case as our topic, standing as it does at the intersection of constitutional and statutory anti-discrimination law, reapportionment, and minority vote dilution.

8. In *Shaw*, the Court held that the plaintiffs had stated an equal protection claim when they alleged that a districting scheme was sufficiently irregular that it could not be explained except as an effort to separate the races for purposes of political participation. *Id.* at 2824. The challenged district, a narrow corridor spanning 160 miles of north-central North Carolina, was constructed in response to a Section 5 objection interposed by the Attorney General's office. The Attorney General had stated that the State's initial reapportionment plan, which contained one majority black district, could have been redrawn so as to constitute a second.

Several features of this opinion suggest that *Shaw* itself will intensify the trend away from a historical concern with the social and political subordination of blacks, toward a de-contextualized equal protection analysis that purports to place all groups on the same footing. The Court's refusal to be bound by *United Jewish Org. v. Carey*, 430 U.S. 144 (1977), a case that restricted constitutional vote dilution claims to groups, such as blacks, that had suffered a legacy of discrimination, is one such

authorized race-consciousness of the Voting Rights Act is worked out by the courts,⁹ enforcement officials will face other "second generation" questions. To what phases of the political process—beyond the most obvious phase of elections—do the Act's protections extend? And to what institutions—beyond the paradigmatic case of the legislature—do its prescriptions apply?

Two recent Supreme Court cases on the Voting Rights Act, *Presley v. Etowah County Commission*¹⁰ and *Chisom v. Roemer*,¹¹ preview these latter questions. *Presley* concerns the applicability of Section 5¹² to changes in the responsibilities of elected officials;¹³ *Chisom* asks whether

indication. *Shaw*, 113 S. Ct. at 2829-30. Perhaps more salient is the Court's reinterpretation of *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the classic case of transparent invidious discrimination against blacks, to stand for the proposition that irregularly shaped districts should trigger scrutiny not when they raise an inference of invidious exclusion of the systematically disempowered, but when they suggest any kind of political decisionmaking that takes race into account. *Shaw*, 113 S. Ct. at 2827-29.

It is noteworthy, however, that some voting rights experts believe that the impact of *Shaw* will be limited. See Bernard Grofman, *High Court Ruling Won't Doom Racial Gerrymandering*, CHI. TRIB., July 9, 1993, at 19 (suggesting that *Shaw* carves out only a narrow exception to permissible race-conscious districting because most districts will not be "bizarre" enough to trigger constitutional scrutiny).

9. Many questions, which remain unresolved by *Shaw*, will be addressed by the lower courts charged with applying it. First among them is whether these plaintiffs had made an equal protection argument on which they should be entitled to prevail. The majority anticipates this question, in a way that previews future struggles over the scope of Section 5—a second question to be resolved in future adjudication. The majority contends that the State's potential rejoinder in this case—that it created the district to comply with the Section 5 mandate of nonretrogression—would not, in and of itself, be sufficient. *Shaw*, 113 S. Ct. at 2834 (stating that Section 5 jurisprudence does not "give covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression"). The Court hints, however, that a plan "narrowly tailored" to the Section 5 mandate of nonretrogression might survive constitutional scrutiny. *Id.* at 2831, 2830-31. The conclusion implied by this line of analysis—that governmental interpretations of Section 5 that are not based exclusively on nonretrogression, or plans that execute this goal with insufficient narrowness might be adjudged unconstitutional—calls into question a range of pre-existing Section 5 practices. Yet what the lower courts will make of these speculations, which are at present no more than dicta, remains to be seen.

Also uncertain is the future of Section 2 adjudication after *Shaw*. The majority suggests that where a Section 2 violation has been established, under statutory and doctrinal criteria, race-conscious districting may not be constitutionally suspect. See *id.* at 2830 (discussing the need to demonstrate racial block voting and minority group political cohesion). Yet, in assessing the State's claim that the plan was adopted to avoid a violation of Section 2, the majority offers an important qualification. The opinion reiterates the plaintiff's argument that if the State perceived a Section 2 problem (under factual circumstances that included three recent black electoral victories), the State's interpretation of Section 2 could itself be unconstitutional. *Id.* at 2831. Though it does not resolve the question, the Court's foray into this area seems to problematize prophylactic attention to the demands of Section 2 and to create a constitutional cloud over all but its narrowest interpretations.

10. 112 S. Ct. 820 (1992).

11. 111 S. Ct. 2354 (1991).

12. Section 5 prevents minority vote dilution through a different procedural mechanism: changes relating to voting that are proposed in certain jurisdictions must be precleared by the federal judiciary or the Attorney General before they can be implemented. Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (1988).

13. See *Presley*, 112 S. Ct. at 830.

Section 2 applies to judicial elections.¹⁴ If one's inquiry is limited to the four corners of the opinions, neither decision invites sustained theorizing. Both could be described as "easy" cases: *Presley* was widely regarded as "wrong,"¹⁵ *Chisom* was taken almost uncontroversially as correct.¹⁶ Neither, moreover, rests on a strong theoretical underpinning: one reflects a classic judicial retreat from the "slippery slope"; the other relies on basic principles of statutory construction. Yet if these decisions are studied not as judicial texts, but as controversies framing emerging issues of enforcement, they may help to elaborate the meaning of equal electoral opportunity and define the terrain to be protected against the incursions of *Shaw v. Reno*.

In this essay, I will use a critique of *Presley v. Etowah County Commission* to highlight a more complete vision of electoral opportunity: the right to a relationship of representation with an elected official, which begins before and continues after the aggregative exercise of election day. I will then test and develop this notion by exploring it in a less familiar context: that involving judges, prosecutors, and other nonlegislative elected officials.

I. The Post-Election Context

In *Presley v. Etowah County Commission*, the Court considered whether changes in the responsibilities of two county commissioners were subject to the preclearance requirements of Section 5 of the Voting Rights Act.¹⁷ The facts of the Etowah County case were troubling. The implementation of a consent decree had created two new electoral districts and facilitated the election of a black county commissioner.¹⁸ Soon after the new members took office, the Commission voted, over the new commissioners' objections, to alter the prior practice of making each commissioner responsible for the maintenance and allocation of funds for his road district.¹⁹ The holdover commissioners remained responsible for the roads in their modified districts and acquired joint power over the districts of the two new commissioners, who were given new, nonroad-related responsibil-

14. See *Chisom*, 111 S. Ct. at 2364.

15. See, e.g., Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE L.J. 105, 191 (1992); Nancy C. Zaragoza, Note, *Participation Without Representation: The Meaning of the Right to Vote After Presley v. Etowah County Commission*, 112 S. Ct. 820 (1992), 67 WASH. L. REV. 1023, 1024 (1992).

16. See, e.g., Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 425-26 (1992); Dotti C. Venable, Note, *Chisom v. Roemer: One Step Forward, Two Steps Back*, 21 STETSON L. REV. 985, 1011 (1992).

17. 112 S. Ct. 820 (1992).

18. *Id.* at 825.

19. *Id.* at 825-26.

ities.²⁰ The prior system of individual control over the allocation of funds was replaced by a system in which control was conferred on the Commission as a whole.²¹ In the Russell County case, the facts were less redolent of intentional discrimination but reflected palpable changes in the powers of elected officials. In this case, concern over corruption in the conduct of commission duties resulted in the adoption of a resolution that abolished individual road districts and transferred responsibility for all road operations to the commission-appointed county engineer.²² In *Presley*, the Supreme Court held, in an opinion by Justice Kennedy, that neither the Russell County nor the Etowah County changes were required to be pre-cleared under Section 5.²³

The Court's interpretation ostensibly took its bearings from *Allen v. State Board of Elections*,²⁴ which held, *inter alia*, that changes affecting the creation or abolition of an elected office are covered under Section 5.²⁵ The Court held that neither situation fell strictly within the area governed by the *Allen* standard, since the resolutions neither decreased the number of offices for which county residents could vote nor replaced a previously elected official with one who was appointed.²⁶ Consequently, the main issue posed by the Etowah and Russell County Commission actions was to determine whether the diminution of the authority of an elected official or the transfer of some part of such authority to an appointed official constituted a change, such as that described in the relevant portion of *Allen*, that affected county residents' right to vote. The Court concluded that an affirmative answer to this question would "work an unconstrained expansion" of coverage under Section 5.²⁷ Whenever a state or local government "adopts a new governmental program or modifies an existing one,"²⁸ it may be said to alter the powers of the responsible officials; and in the absence of a "workable standard for distinguishing between changes in rules governing voting and changes in the routine organization and functioning of government,"²⁹ a holding that the contested changes were covered would embroil the federal courts in myriad minute decisions of state and local bodies.

20. *Id.* at 825.

21. *Id.* at 826.

22. *Id.*

23. *Id.* at 827.

24. 393 U.S. 544 (1969).

25. This holding technically emerged from *Bunton v. Patterson*, one of four decided simultaneously in *Allen*. *Bunton v. Patterson*, 281 F. Supp. 918 (S.D. Miss. 1967), *rev'd sub nom.* *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

26. *Presley*, 112 S. Ct. at 829-31.

27. *Id.* at 829.

28. *Id.*

29. *Id.*

The *Presley* opinion is notable in several respects. First, while the case marked a stark retreat from inclusive judicial constructions of Section 5,³⁰ its reasoning in other respects reflects the dominant jurisprudence of the Voting Rights Act. Eschewing the highly contextual approach that was the hallmark of the earliest minority vote dilution cases,³¹ the Court continued a more recent pattern of giving a formal or numerical gloss to standards for enforcement under the Act.³² A numerical approach to judicial standards has been part of voting rights jurisprudence since the Court determined that the constitutional norm of equality in apportionment required equipopulous districts.³³ This approach offered an easily administrable standard, whose quantitative character spared judges the institutional discomfort of assessing or applying more substantive theories about the nature of the political process.³⁴ Though this pattern was interrupted in the early cases on minority vote dilution,³⁵ recent precedent under the Voting Rights Act has displayed an increasingly formal, quantitative character. This development culminated in the Supreme Court's opinion in *Thornburg v. Gingles*,³⁶ where the majority held that to recover under Section 2, plaintiffs had to demonstrate that they could constitute a majority in a single-member district located within the boundaries of the at-large district in question.³⁷

30. See *id.* at 836-37 (Stevens, J., dissenting) (discussing judicial recognition of the broad scope of Section 5 coverage).

31. See, e.g., *White v. Regester*, 412 U.S. 755 (1973) (applying a contextually based "totality of the circumstances" test).

32. See *infra* text accompanying notes 36-37.

33. See *Reynolds v. Sims*, 377 U.S. 533 (1964). The Court has insisted on this standard with increasing rigidity, at least in the context of federal legislative elections. See, e.g., *Karcher v. Daggett*, 462 U.S. 725, 731 (1983) (rejecting a New Jersey reapportionment plan with a maximum population deviation among districts that was smaller than the predictable undercount in available census data and noting that the simple device of transferring entire political subdivisions between contiguous districts would have produced districts much closer to numerical equality). For a thoughtful critique of this tendency in reapportionment law, see Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643 (1993).

34. See *Baker v. Carr*, 369 U.S. 186, 270, 300 (1962) (Frankfurter, J., dissenting) (arguing that a fully elaborated decision on the appropriate standard would require evaluation of competing political theories, a task more appropriately left to state legislatures).

35. See, e.g., *White v. Regester*, 412 U.S. 755 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom.* *East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976). The Senate Report accompanying the amendment of Section 2 embraced a "totality of the circumstances" test and listed several typical factors "derived from the analytical framework in *White*," which courts should consider in evaluating claims. See S. REP. NO. 417, 97th Cong., 2d Sess. 28 n.113, *reprinted in* 1982 U.S.C.C.A.N. 177, 206.

36. 478 U.S. 30 (1986).

37. *Id.* at 50. In her concurrence, Justice O'Connor objected to this rigid, numerical approach on grounds that bore partial resemblance to Justice Frankfurter's dissent in *Baker*: she argued that the proper identification of minority vote dilution required a theory as to the characteristics of an undiluted vote, a complex qualitative question that the majority opinion failed to address. *Id.* at 92-93. Other decisions that reflect this formal or numerical emphasis include *Martin v. Allain*, 658 F. Supp. 1183,

The majority opinion in *Presley* may be characterized as part of this trend. A change in the *number* of offices for which citizens can vote, or a *replacement* of an elected official with an appointed one, are easily identifiable, even quantifiable events. Focusing on such events has proved reassuring to a Court that remains intermittently ill at ease with its role in refereeing the political process.³⁸ Such standards do not involve the Court in the entangling, qualitative judgments about that process, such as those raised by a holding, for example, that changes in the powers of elected officials may implicate voting rights. Consistent with this described tendency, the *Presley* Court dealt dismissively with the standards proposed by the litigants to guide or cabin such qualitative judgments and declined either to amend such standards or to substitute those of its own making. The United States' argument that the Court could distinguish budget resolutions from others affecting the powers of local officials, for example, was summarily rejected;³⁹ the Court made no effort to explore more administrable or substantively appropriate standards.

Second, the Court's refusal to scrutinize "the routine functioning and organization of government"⁴⁰ could be seen as part of its tendency to see a single event—the aggregative exercise through which candidates are elected—as the culmination of political participation and the focus of voting rights efforts. In the construction of the political process that has shaped voting rights jurisprudence, elections are the single, salient event in minority political participation.⁴¹ Devices that shape their outcomes, such as districting schemes, are the primary focus of adjudication;⁴² procedures

1204 (S.D. Miss. 1987) (rejecting the possibility of a less easily quantifiable ability-to-influence claim reserved by *Gingles*); *Gingles v. Edmisten*, 590 F. Supp. 345, 380-82 (E.D.N.C. 1984) (outlining the court's belief that plaintiffs insufficiently numerous or compact to constitute a majority in a single-member district were not entitled to claim that their votes were diluted by a remedial scheme), *aff'd in part, rev'd in part sub nom.* *Thornburg v. Gingles*, 478 U.S. 30 (1986).

38. For a critique of this trend in voting rights jurisprudence, see *Abrams*, *supra* note 6, at 460-71.

39. *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 830 (1992).

40. *Id.* at 829.

41. The virtually exclusive focus on elections in Voting Rights Act jurisprudence has been criticized from different perspectives. Compare *Abrams*, *supra* note 6 (outlining the assumptions underlying the preference aggregation model, arguing that from a theoretical standpoint the assumptions underlying the model are invalid, and concluding that an interactive model focusing on influence rather than raw preference is desirable) with Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1091-1101 (1991) (tracing the development of courts' and litigants' focus on election results and attributing that development to evidentiary simplicity, ease of proof using computer technology, and courts' desire for certainty).

42. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30 (1986); *White v. Regester*, 412 U.S. 755 (1973); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied sub nom.* *City Council of Chicago v. Ketchum*, 471 U.S. 1135 (1985); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom.* *East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976). See generally ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT?* 63-78 (reviewing voting rights opinions spanning from the 1960s to the 1980s that focus on districting schemes and other devices affecting election outcomes).

that may predate elections but have a direct impact on them, such as voter registration practices,⁴³ come under collateral scrutiny. But there is little understanding of the political process as a temporally extended process, through which participants interact, develop substantive priorities, connect those priorities with the substantive agenda of a candidate, elect (or fail to elect) a candidate, and endeavor to influence that candidate so as to promote their substantive priorities. As a consequence of this view, it becomes possible, as for the majority in *Presley*, to view changes in the powers of elected representatives, which fall short of the complete elimination of electoral offices, as a matter separate from the voting rights of constituents.

Justice Stevens's dissenting opinion reflects a different tack. After describing the electoral context in which the changes were undertaken,⁴⁴ and emphasizing the history of broad interpretation of Section 5,⁴⁵ Stevens brushed aside the Court's reservations about distinguishing between voting rights and routine functions of government.⁴⁶ He highlighted two standards that could be used to assess diminutions or partial transfers in the powers of elected officials, standards under which *Presley* could have been differently decided. "At the very least," he stated, changes in the decision-making authority of an elected official that are undertaken "(1) after the victory of a black candidate, and (2) after the entry of a consent decree designed to give black voters an opportunity to have representation ou an elective body"⁴⁷ should be covered by Section 5—a standard that would have changed the outcome only in the Etowah County case.⁴⁸ But Stevens also proposed a "broader standard," which could have covered both cases: changes that "enhanc[e] the power of the majority over a segment of the political commuunity that might otherwise be adequately represented"⁴⁹ or, more specifically, have the effect of "transferring authority from an elected district representative to an official, or a group, controlled by the majority"⁵⁰ require preclearance under the Act.

One might quarrel with the content of Justice Stevens's standards: the first might be too concerned with inferences of discriminatory intent; the second with relative, rather than absolute, measurements of minority political power. But the opinion, and the proposed standards, offer an

43. *See, e.g.*, *Bishop v. Lomenzo*, 350 F. Supp. 576, 586-90 (E.D.N.Y. 1972) (finding that early closing of registration violates the Voting Rights Act).

44. *Presley*, 112 S. Ct. at 832 (Stevens, J., dissenting).

45. *Id.* at 835-38.

46. *Id.* at 840.

47. *Id.* at 839.

48. *Id.* at 840 (noting that this standard would not cover the Russell County case).

49. *Id.*

50. *Id.*

instructive contrast with the majority's rigid, limiting construction of the Act. First, Stevens is not reluctant to reach qualitative judgments about the fairness or inclusiveness of the political process. His standards are neither formal nor numerical: both standards are at least implicitly alert to context; the second is concerned with a broadly defined substantive value—the political power of minority constituents and the usurpation of that power by majority interests. Second, Stevens implicitly acknowledges that the political process through which that power is allocated neither ends nor even culminates on election day. Because voters attain and exercise their power by attempting to influence the choices of their representatives, changes in the authority of those representatives have tangible consequences for their constituents. The voters in the road districts of the new Etowah County commissioners have no one electorally accountable to them on whom they can press their proposals for change. Because of these differences, Stevens is able to acknowledge, in a way that the majority resists, that diminution or partial transfer of the authority of elected officials implicates the voting rights of minority constituents.⁵¹

Understood in this way, Stevens's opinion evokes an alternate vision of voting rights jurisprudence.⁵² According to this vision, political participation is not a single event, but a temporally extended process that begins with reflection on and formulation of substantive preferences and continues through the implementation of those preferences through the efforts of elected representatives.⁵³ It includes many activities that occur after the initial election of a representative, such as face-to-face (or delegated) persuasion by constituents, attempts to act on constituents' programs by representatives, and assessment by constituents of representatives' efforts prior to the next election. Though citizens may not take part in all, or any, of these activities,⁵⁴ this view assumes that participation in

51. *See id.*

52. Elements of this vision of political participation, such as the focus on events and activities before and after election day, were articulated in Abrams, *supra* note 6. The greater emphasis in this Paper on postelection activities can be traced to my reaction to *Presley*, as well as to what I have learned from the voting rights scholarship that followed *Gingles*. *See* Guinier, *supra* note 6; Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173 (1989).

53. An account of the political process that reflects some semblance of this extended character was offered in *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) ("[T]he power to influence the political process is not limited to winning elections."). It should be noted, however, that the need to scrutinize a more extended political process reduces the likelihood of judicial intervention in the context of political gerrymandering, whereas a more temporally extended view of the political process would tend to increase the occasions for judicial intervention under the Voting Rights Act.

54. Factually, it is the case that most citizens participate—if at all—only through voting. Indeed, some theorists argue that an understanding of (and acquiescence in) the fact that most of the time most citizens participate in this limited way is central to our constitutional system. *See* Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

many or all phases, by at least some voters, is necessary to secure the substantive benefits that flow from representation; therefore, protection of each of these phases is a predicate to full electoral opportunity. Participation in this process is defined not through a single formal criterion, such as the ability to elect the candidates of one's choice, but through a series of criteria, some of which—such as those that apply to elections—may have quantitative elements, and others of which—such as those that apply to changes in the authority of elected officials—are largely qualitative in nature.

This vision is concerned with the political power of minority constituents as they move through the multiple phases of the political process: the concept that captures the connections among those phases is the relationship of constituents with their elected representatives. This relationship, which is formalized on election day but takes root before it and continues after it, is the instrument through which voters vindicate their substantive preferences. Its success requires that neither the structure of electoral institutions nor the attitudes of other representatives systematically prevent minority representatives from giving voice and efficacy to those preferences. The Voting Rights Act should protect the relationships of minority constituents with their representatives because the inability of minority voters to attain and exploit such relationships has been the symbol and consequence of their political exclusion. This approach to the Act makes it easier to understand why changes in the responsibilities of elected officials implicate the voting rights of constituents: they alter the political relationship through which those constituents exercise their power.

II. Beyond the Legislative Context

If the focus on relationships of representation between officials and their constituents is well-suited to address one second-generation problem—issues of political influence that arise after election day—it seems less well-suited to confront another: the elaboration of voting rights protection beyond the legislative context. Relationships between elected judges, prosecutors, clerks, and their constituents differ significantly from the paradigmatic legislative relationships explored above. The opportunity for articulation of substantive priorities and registration of these priorities with candidates for nonlegislative offices is present, though it is far more limited than in the context of legislative elections. The aggregation of voter preferences, as in other electoral contexts, may create a formal relationship between nonlegislative officials and their constituents. But there the similarities would seem to end.

The role of prosecutor, for example, blends popular responsiveness with a more detached obligation to legal command. The substance of prosecutions and the range of educational and legislative tasks undertaken

by the prosecutor vary demonstrably from jurisdiction to jurisdiction—variations that arise not only from the demographics of each area but also from the expressed preferences of its citizens.⁵⁵ Although prosecutors do not provide individual constituent “service” in the way that legislators do, they meet formally and informally with a range of constituents, including organized interests such as victims’ rights groups.⁵⁶ On the other hand, prosecutors are also a part of a system of “justice,”⁵⁷ which suggests that their task is defined and measured by objective criteria beyond public opinion. Their formal charge in prosecution is to represent “the people” of their jurisdiction,⁵⁸ a unitary designation that seems to supplant the interests of subgroups. When their responsibilities are not prescribed by statute, they are structured by a celebrated prosecutorial “discretion” that functions both to connect prosecutors to, and to insulate them from, those who elect them.⁵⁹

Elected judges play a role that is more unambiguously detached from popular opinion. They share with state prosecutors a federal analogue in

55. See JOAN JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 47-77, 217-70 (1980) (detailing the impact of population and other demographic variables on prosecutorial function and demonstrating variation by surveying three prosecutors’ offices).

56. As an example of a prosecutor’s office that values and cultivates contact with and direct responsiveness to citizen concerns, Joan Jacoby points to the Twentieth Judicial District Attorney’s Office in Boulder, Colorado. *Id.* at 255-70. In this office the District Attorney meets weekly with a group of eight to twelve citizens (who are “somewhat randomly selected” to represent a variety of interests) to discuss postconviction options for defendants in the community as well as any other topics on the minds of community members. *Id.* at 268-69.

57. It is interesting, in this regard, to note that prosecutors, until the mid-nineteenth century, were not understood to be executive officials but were thought to be “minor actor[s]” in the structure of the judicial branch. See *id.* at 23. In light of this understanding, it is not surprising that both prosecutors and state judges began to be elected during the Jacksonian period. *Id.* at 19-27. Nor is it surprising that some of the same arguments made against the election of judges have been made against the election of prosecutors. First, popular selection may militate against selection according to merit. See *id.* at 24; Earl H. DeLong & Newman F. Baker, *The Prosecuting Attorney: Provisions of Law Organizing the Office*, 23 J. CRIM. L. & CRIMINOLOGY 926, 962 (1932). Second, prosecutors who are concerned about popular approval may pay less attention to the formal legal constraints of their role. See JACOBY, *supra* note 55, at 34; AUSTIN F. MACDONALD, *AMERICAN STATE GOVERNMENT AND ADMINISTRATION* 474 (6th ed. 1960).

58. Cf. JACOBY, *supra* note 55, at 25 (tracing the development of the view that the prosecutor is a part of the executive branch).

59. Prosecutorial discretion lies in three critical areas. The prosecutor has the power to decide: (1) whether criminal action will be brought; (2) at what level the accused should be charged; and (3) whether and when prosecution should be terminated. *Id.* at 29; Jack M. Kress, *Progress and Prosecution*, 423 ANNALS OF AM. ACAD. POL. & SOC. SCI. 99, 100 (1976).

Jacoby notes that the exercise and judicial affirmation of prosecutorial discretion made the prosecutor a more independent and powerful official. JACOBY, *supra* note 55, at 28-30. On the other hand, as courts have insisted, the ultimate control over prosecutorial discretion is held by the voters. See *Milliken v. Stone*, 7 F.2d 397, 399 (S.D.N.Y. 1925) (“The remedy for [prosecutorial] inactivity . . . is with the executive and ultimately with the people.”), *cert. denied*, 274 U.S. 748 (1927). Prosecutors who recognize this control often have exercised their discretion in direct response to “local custom and sentiment.” JACOBY, *supra* note 55, at 34.

which appointment has been the exclusive mode of selection. The command of detachment implicit in the federal mode of selection has shaped public perception of state judiciaries, despite the fact that state judges may be elected for one or more terms or appointed subject to re-election or recall. Elected judges' connections with their constituents are also more attenuated than those of other elected officials, including prosecutors. Judges may appear before their publics in highly visible settings, but closed-door meetings with constituent groups are rare and problematic, and meetings prior to particular decisions are viewed as highly inappropriate.⁶⁰ The opinions of their constituents influence elected judges only in an indirect, atmospheric manner;⁶¹ and many commentators suggest that it is the responsibility of the judge to be immune even to such atmospherics.⁶² Conversely, while citizens may elect judges to the state bench, uncertainty persists as to whether the criteria for election should include the record of the judge in vindicating voters' substantive preferences.⁶³

Despite these differences, however, the Court held in *Chisom v. Roemer* that election of state judges was covered under Section 2 of the Act.⁶⁴ In *Chisom*, which concerned the election of Louisiana's state supreme court, the Court rejected the notion that the statutory term "representatives" did not apply to judges. Resting largely on legislative history and standard canons of statutory construction, Justice Stevens held that "representatives" referred to the "winners of representative, popular elections,"⁶⁵ a category which self-evidently included elected judges.

60. One exception may be circumstances under which a judge is prescribing injunctive relief: it may be necessary to bear from community or advocacy groups in order to implement the most effective remedy. But such injunctions most often have been the instrument of federal courts. See OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 14-15 (1978).

61. For a discussion of the "atmospheric" influence of constituent opinions on elected judges, see *infra* text accompanying notes 107-16.

62. See, e.g., *LULAC Council No. 4434 v. Clements*, 914 F.2d 620, 626 (5th Cir. 1990) (en banc), *rev'd sub nom. Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376 (1991) ("[T]he quality most needed in a judge is the ability to withstand the pressures of public opinion in order to ensure the primacy of the rule of law over the fluctuating politics of the hour." (quoting Eugene W. Hickok, Jr., *Judicial Selection: The Political Roots of Advice and Consent*, in *JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS* 3, 5 (National Legal Ctr. for the Pub. Interest ed., 1990))).

63. PATRICK M. MCFADDEN, *ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS* 85 (American Judicature Soc'y ed., 1990) (discussing the propriety of candidates' using the decisions of a sitting judge as campaign issues and noting that state rules limiting the candidates' discussion of their views on legal and political issues stem from the notion that "the legal and philosophical views of judges do not or should not affect their decisions").

64. *Chisom v. Roemer*, 111 S. Ct. 2354, 2362 (1991). Section 5 coverage had been established in earlier cases. See, e.g., *Clark v. Roemer*, 111 S. Ct. 2096, 2101 (1991); *Brooks v. State Bd. of Elections*, 775 F. Supp. 1470, 1475 (S.D. Ga. 1989), *aff'd mem.*, 111 S. Ct. 288 (1990), *recons. granted in part*, 775 F. Supp. 1490 (S.D. Ga. 1991); *Haith v. Martin*, 618 F. Supp. 410, 413 (E.D.N.C. 1985), *aff'd mem.*, 477 U.S. 901 (1986).

65. *Chisom*, 111 S. Ct. at 2366. Justice Stevens makes several arguments. He argues first that as originally enacted, Section 2 was coterminous with the coverage of the Fifteenth Amendment and

One might reconcile *Chisom* with *Presley* by saying that *Chisom* was a textbook case of statutory construction: the Court moves beyond the paradigmatic case of legislative elections only with a clear statutory mandate. One might also say that both majority opinions reflect a formal preoccupation, in construing the Act, with the ability of minority voters to elect candidates of their choice. In *Presley*, this ability has already been vindicated by the creation of new commission districts; what happens among elected decisionmakers afterward does not implicate constituents' voting rights. In *Chisom*, thwarting the ability of minority members to elect their own candidates through a system including at-large districts makes the case ripe for Section 2 scrutiny, regardless of the function of the elected officials in question. Yet for those who reject the restriction of the Act to the immediate electoral context, or for those who are less concerned with reconciling these cases than with fleshing out the second-generation Voting Rights Act questions they preview, this synthesis provides no satisfying answer.⁶⁶ If the Act, as I suggest above, protects the opportunity of constituents to establish a relationship with their chosen representatives that serves to vindicate their substantive interests, the question becomes: What kind of relationship, serving what kind of substantive interests, can occur between nonlegislative officials and those who elect them?⁶⁷

To address this question, it will be useful to begin not from the comparatively contentless victory in *Chisom*,⁶⁸ but from the opposing

was understood to include judges. If Congress, whose 1982 amendment of Section 2 was generally understood to extend protection beyond constitutional limits, had intended to curtail coverage in the judicial area, it would have made this intention explicit in the statute or legislative history. *Id.* at 2362-64. Second, the choice of the word "representatives" to replace the word "legislators," taken from *White v. Regester*, 412 U.S. 755, 766 (1972), indicates congressional intent to provide protection beyond legislative elections; moreover, the word "candidate," which respondents argued Congress would have used had it included comprehensive coverage, is not synonymous with "representative" and therefore not a viable alternative. *Id.* at 2366-67. Third, Justice Stevens argues, to hold that judges are not covered under Section 2 would create a conflict with Section 5 of the statute, under which judges have already been held to be covered. *Id.* at 2367.

66. The above synthesis might also seem unsatisfying given that Justice Stevens, who was the author of the majority opinion in *Chisom*, wrote the dissent in *Presley*. While it is possible that Justice Stevens views the right to elect the candidates of one's choice as a necessary but not always sufficient condition for compliance with the Voting Rights Act (*i.e.*, "representatives" must always be subject to election without minority vote dilution, regardless of what other measures need to be taken to secure equal electoral opportunity), his *Presley* dissent seems to take an extended, relational view of the electoral process, which would make the nature of the relationship between judges and their constituents an important subject of inquiry. See *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 834-38 (1992) (Stevens, J., dissenting).

67. For an interesting discussion of the value—and the constitutional requirement—of representing historically disadvantaged groups on the bench, see Larry W. Yackle, *Choosing Judges the Democratic Way*, 69 B.U. L. REV. 273, 276 (1989). Yackle, however, focuses not on the relationship between judges and those who elect them (he discusses appointed as well as elected judges), but on the ways in which racial and gender diversity on the bench signals equal concern and respect for a variety of groups among the governed. *Id.* at 296.

68. The opinion in *Chisom* is not entirely devoid of discussion of the nature of the representative

perspective: one that rejects the coverage of judges (and other nonlegislative officials) because of the belief that no such relationship with constituents is possible. A typical articulation of this view may be found in the majority opinion in *LULAC v. Clements*,⁶⁹ the Fifth Circuit case whose departure from earlier precedent set up the Supreme Court challenge in *Chisom*.⁷⁰ The majority in *LULAC*, deciding whether an at-large scheme for the election of state district court judges could be challenged under Section 2, held that judges could not have been intended by Congress to be included within the category of "representatives" under the Act.⁷¹ Judge Gee's opinion states that judges "serve[] no representative function whatsoever":⁷² the judiciary need neither reflect nor satisfy public opinion in its decisions. In fact, "the quality most needed in a judge is the ability to withstand the pressures of public opinion in order to ensure the primacy of the rule of law over the fluctuating policies of the hour."⁷³ Noting that judges need not even be elected—citing the federal and early state appointment of judges as precedent—the opinion suggests that any concern with the opinion of the electorate within their jurisdiction replaces judges' much-valued impartiality with inappropriate partisanship.⁷⁴

Although the role of the prosecutor, as noted above, has a hybrid quality that distinguishes it from the judiciary, many of the above arguments might be made, in inoderated form, in the prosecutorial context.⁷⁵

relationship. The majority in *Chisom* notes that neither the longstanding emphasis on judicial independence nor the fact that judges do not consult with or advocate on behalf of particular constituents should prevent judges from being characterized as "representatives." See *Chisom*, 111 S. Ct. at 2367. Other officials, such as prosecutors and attorneys general, who do not consult with or advocate for constituents, are characterized as "representatives" under the Act when they are subject to elections. *Id.* at 2366. And while a judge has an obligation to render impartial judgment, which a legislator does not, a state's decision to make judges subject to election means that it has not chosen the traditional, federal path of wholly insulating judges from the substantive views of the public. *Id.* at 2367. Yet these suggestions, as noted above, do not ground the opinion; moreover, even as dicta, they provide only a series of tantalizing hints rather than a sustained analysis of the relation between judge and voter.

69. 914 F.2d 620 (5th Cir. 1990) (en banc), *rev'd sub nom.* Houston Lawyers' Ass'n v. Attorney Gen., 111 S. Ct. 2376 (1991). It is useful to look closely at the Fifth Circuit opinions in *LULAC*, rather than the Court's opinion in *Chisom*, because the *LULAC* opinions treat explicitly, and extensively, the question that animates, but is never squarely dealt with in *Chisom*: the nature of judicial representation.

70. See *Chisom*, 111 S. Ct. at 2360-61.

71. See *LULAC*, 914 F.2d at 628-29. Judge Gee's opinion notes that in construing the term "representative," courts uniformly have found that it did not extend to the judicial office. *Id.* at 628. "Against this background, then," the opinion notes, "Congress deliberately picked a term of art for amending Section 2 that up to that time had been universally held, and which it *knew* had been universally held . . . neither to include judges nor to comprise judicial offices." *Id.* (emphasis in original).

72. *Id.* at 625.

73. *Id.* at 626 (citing Hickok, *supra* note 61, at 5).

74. *Id.* at 625 n.8, 626.

75. It should be noted that, although there are instructive theoretical similarities, the situation of prosecutors from the standpoint of Voting Rights Act enforcement may be different from that of judges. On the one hand, the notion that prosecutors, as elected officials, might be subject to the constraints

The prosecutor has at least a formal obligation to hear the concerns of her constituents, and her discretion gives her an avenue through which to apply these concerns to her task. Yet, unlike the legislator, her direction and responsibilities are not defined by public opinion but by the obligation to enforce the law—to represent “the people” in a more abstract and enduring sense by the enforcement of “their” criminal code.⁷⁶ Moreover, the state prosecutor, like the state judge, has a federal counterpart, though the unelected status of U.S. Attorneys is less important in shaping popular conceptions of the prosecutorial role. And while partisanship is not the problem for a prosecutor that it is for a judge—a prosecutor in the litigation context is always a partisan—too much emphasis on the interests of a subgroup as against the interests of the “community as a whole,” or too much emphasis on the vicissitudes of community opinion as compared with the more enduring interests thought to be embodied in criminal law, may detract from the legitimacy of the prosecutor’s efforts.

This view of nonlegislative officials’ roles renders problematic the application of Voting Rights Act protections beyond the legislative realm. The relationships of representation that I argue should be the objects of the Act’s protection are not present or are present only in attenuated form in

of the Voting Rights Act has not proved nearly as controversial as the similar notion advanced in the judicial area. On the other hand, the coverage of the prosecutorial office under Section 2 could potentially be limited by the single-member office exception—a recent, judicially crafted rule that exempts offices held by a single member from many categories of Section 2 challenges. *See, e.g.,* *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986) (holding that a runoff election requirement in an election for a single-member office “does not deny a class an opportunity for equal representation and therefore cannot violate the Act”). A version of this doctrine was applied to district judges in Judge Higginbotham’s opinion in *LULAC*. *LULAC*, 914 F.2d at 650, 648-51 (Higginbotham, J., dissenting) (arguing that the *Butts* single-member office exception applies to judges in multi-judge counties because each judge is a single “decisionmaking body”). In the Supreme Court’s opinion in *LULAC*, 111 S. Ct. 2376 (1991), Justice Stevens held that the election of “executive officers and trial judges whose responsibilities are exercised independently in an area coextensive with the districts from which they are elected,” *id.* at 2380, does not remove such offices from coverage under Section 2, as practices such as irregular polling procedures might still produce a violation. But the single-member nature of such offices would be a factor to be considered in applying the “totality of the circumstances” test for finding a violation or in devising a remedy. However, the precise content and scope of this doctrine remain unresolved, and advocates and commentators have argued persuasively that the exception should be narrowed or rejected. For a superb discussion of the shortcomings of the exception, see Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 24-39 (1991) (arguing that the single-member office exception fails to recognize potential fluidity in the structure of coalitions and that participatory rights of minority voters may be affected by voting rules or devices relating to single-member offices, notwithstanding the fact that the present, single-member character of those offices does not permit minorities to attain “equal” or proportional representation). *Certiorari* has recently been granted by the Supreme Court in a case that may clarify the contours of this doctrine. *See* *Hall v. Holder*, 955 F.2d 1563 (11th Cir. 1992), *cert. granted*, 113 S. Ct. 1382 (1993).

76. *See* *Town of Newton v. Rumery*, 480 U.S. 386, 412 (1987) (noting that a state prosecutor’s “primary duty” is to “represent the sovereign’s interest in the evenhanded and effective enforcement of its criminal laws”).

these executive and judicial settings. I will argue, however, that the above view presents a flawed and incomplete picture of nonlegislative representation. First, the federal analogy obscures important differences in state officials' roles, an argument that applies principally to judges. Second, the notion of representation embodied in the legislative context, and insisted upon by Judge Gee in *LULAC*,⁷⁷ reflects a narrow and impoverished view of the possible meanings of "representative." There are other possible understandings of the relationship between representatives and those they serve that are better suited to nonlegislative contexts and that argue strongly for Voting Rights Act protection in these settings as well.

A. *The Federal Analogy*

The conventional view of the role of nonlegislative officials—specifically, elected judges—reflects a misleading federalization of the judicial role.⁷⁸ This view assumes that it is inherent in the judicial role to be wholly insulated from public opinion and that judges perform a limited number of functions, the larger part of which involve measuring the legislative products of popular opinion by some higher law.⁷⁹ Both of these assumptions demand closer scrutiny. Judicial insulation, even as an aspiration for the federal bench, reflects only a partial picture, as the endless debates over accountability and judicial review attest. Louis Michael Seidman has argued, for example, that the more accurate characterization is of a tension, running throughout the judicial office, between independence and accountability to a larger public.⁸⁰ This tension may be glimpsed in the office of state court judges as well, yet the balance struck between the poles of independence and accountability is more variable than for the federal judiciary. It seems hasty to disregard the state's choice of a selection process, as does Judge Gee, by saying that judges need not ever be elected.⁸¹ It seems more plausible to suggest, as does Justice Stevens in *Chisom*, that by deciding on a process of election rather than appointment, a state has opted to locate its judiciary at a point on the independence-accountability spectrum different from that favored by the

77. *LULAC*, 914 F.2d at 628-29.

78. See Louis M. Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1577 (1988) ("The claim is frequently made that the federal judiciary . . . has generated outcomes that on balance are preferable on the merits to the outcomes that would have been generated by more publicly accountable institutions.").

79. *Id.* at 1595 ("[I]t seems to be true that many people accept the legitimacy of techniques—like a nonaccountable judiciary—that frustrate vindication of present preferences, and this acceptance seems to imply an ability [of the judiciary] to transcend [present day political] context.").

80. See *id.* at 1599, 1571-73 (arguing that the judicial system "is defined by a common web of different kinds and degrees of accountability" due to "our various decisions to limit—or not to limit—the power or independence of judges").

81. See *LULAC*, 914 F.2d at 631.

Framers of the Constitution.⁸² Moreover, by permitting elected judges to stand for re-election, or requiring retention elections for appointed judges, states locate their judiciaries at still different points along the spectrum. Yet none of these points places an exclusive emphasis on insulation, and all of them place a greater emphasis on popular accountability than the federal model.⁸³

When one considers the functions of a state judiciary, one finds a departure from the federal model as well. Some portion of the state court docket is concerned with the task of squaring state legislation with higher law, particularly at the appellate court level. But a larger component of the docket is dedicated to tasks that are enhanced by sensitivity to, rather than the ability to resist, popular opinion. At the trial court level, the many functions of the judge that relate to crime control may be assisted by an awareness of attitudes within the jurisdiction.⁸⁴ At the appellate level, common-law functions such as the adoption of a comparative fault standard,⁸⁵ or the determination of a forced spousal share of intestate property distribution,⁸⁶ require a judiciary that is sensitive to the views of state citizens.

B. *Visions of Representation*

These observations point to a second major problem with the view of nonlegislative officials drawn from the Gee opinion. Its Manichaeian contrast between the partisan "representative" and those impartial elected officials who serve the interests of "justice" offers a narrow and limited view of the possible meanings of "representative." The theoretical literature on representation, epitomized perhaps by Hanna Pitkin's landmark work,⁸⁷ reminds us of the many meanings and nuances inherent in the

82. See *Chisom v. Roemer*, 111 S. Ct. 2354, 2367 (1991).

83. In the prosecutorial context, as noted above, the federal analogy does not exert nearly as much influence on popular and scholarly conceptions of the role of state officials. This may be partly attributable to the fact that the non-electoral selection of the U.S. Attorney is not constitutionally prescribed, as in the case of federal judges. It may also be attributable to the fact that the U.S. Attorney's visibility does not consistently dwarf that of state prosecutors, as is often the case with federal judges; in fact, many people may have more exposure to the activities of their local district attorney than to her federal counterpart. However, notwithstanding the lesser influence of the federal analogy in this area, one could still say that its influence should be constrained for many of the same reasons that apply to judges. The decision to make state prosecutors elective, which came at the same time as the move to elect state judges, reflects many of the same judgments: a Jacksonian-inspired belief in the importance of popular accountability, and a belief that such accountability can be reconciled with the need for independence and meritorious performance of duty without completely submerging the latter values.

84. See Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 1997 (1988) (detailing crime-control functions of state trial court judges).

85. See *LULAC*, 914 F.2d at 636 (Higginbotham, J., dissenting).

86. I thank Stewart Schwab for this example.

87. HANNA F. PITKIN, *THE CONCEPT OF REPRESENTATION* (1967). Pitkin discusses many of the

term “representative,” of which the ostensibly paradigmatic case of the legislator marks only one.

Pitkin describes several kinds of representation that do not demand or emphasize a close correspondence between the actions of representatives and the subjective preferences of their constituents. For example, theories of “formal” representation, which trace their origins to Hobbes, may emphasize (and correspondingly scrutinize) the authorization through which the representative acquires the power to act for the represented, or have the normative consequences of her actions attributed to them.⁸⁸ Theories of “descriptive representation,” which find their fullest expression in systems of proportional representation, stress the sharing of readily perceptible traits or values between the representative and the represented, qualities that may, but need not, produce a correspondence between the representative’s actions and her constituents’ views.⁸⁹ In only one of Pitkin’s categories of representation—“acting for” representation—is representation a substantive activity aimed at achieving this correspondence.⁹⁰ Yet, as described by Pitkin, this activity encompasses a broad range of possible relations from virtual representation to electoral mandate.⁹¹

In her conclusion, Pitkin outlines a general theory of substantive correspondence, achieved through what she labels “political representation.”⁹² The representative, Pitkin argues, “must act independently”: “his action must involve discretion and judgment; he must be the one who acts.”⁹³ But the represented must be “capable of independent action and judgment”; they are to be served by their representative, not “merely . . . taken care of.”⁹⁴ The representative must respond to his constituents in such a way that their subjective preferences and his choices do not conflict; or if they do, he must provide some explanation.⁹⁵ There need not be a constant activity of “advising and responding,” but there must be, on the part of the representative, a “condition of responsiveness” and the instrumental means for responding.⁹⁶

relevant works within this literature, including those of Hobbes, Weber, DeGrazia, Gosnell, Burke, and Madison.

88. *See id.* at 41-54. Pitkin notes that one might think of a judge, or an ambassador, as being a representative in this sense. *Id.* at 41.

89. *See id.* at 60-62.

90. *See id.* at 114-15.

91. *See id.* at 144-68. Pitkin also discusses the relationship between the actions of the representative and the views of the represented in Burke and *The Federalist*. *Id.* at 168-209.

92. *Id.* at 209-40.

93. *Id.* at 209.

94. *Id.*

95. *Id.*

96. *Id.* at 232-33.

This discussion suggests that prosecutors engage in something like “acting for” representation.⁹⁷ Though the prosecutor has the power to act, she acts for a community of people who are capable of judgment regarding the choices she makes. These constituents do not constantly advise her concerning their preferences. Yet her office, and her elected status, incline her to receptivity when such advice is offered; and her discretion provides her a practical avenue through which to channel it. Such guidance is not the prosecutor’s only source of direction—a circumstance that does not actually distinguish prosecutors from other “political representatives,” who must attend to organized interests, legislative colleagues, and their own political and moral predilections.⁹⁸ But the foregoing features of her office mean that a correspondence between her choices and the preferences of her constituents will usually be achieved, and when it is not, the prosecutor will often be at pains to justify her divergence from the advice proffered.

If Pitkin’s theories help clarify the representative role of prosecutors, they also highlight the differences between prosecutors and their more troublesome nonlegislative counterparts, elected judges. Judges receive no formal advice from their constituents. Moreover, several other features of “political representation”—constituent capacity to judge representatives’ choices, judicial receptivity to constituent advice, and perceived obligation to justify departures from it—remain controversial in the judicial context, even after the influence of the federal analogue has been properly constrained. It is possible to understand judges as “formal” representatives of their electors, with the power to bind them to certain normative outcomes; under certain electoral schemes, it would even be possible to imagine judges as “descriptive[ly]” representative of their constituents.⁹⁹ But if

97. This close fit between Pitkin’s vision of “political representation” and the prosecutor’s role may help explain why, as an intuitive matter, many observers are not as troubled by the idea of elected prosecutors as by the idea of elected judges. This easier acceptance may also be attributable to the fact that prosecutors, though they apply the law, are understood as partisans and are not held to the same standard of objectivity—a quality that might seem to require detachment from the opinions of electors. See *supra* text accompanying notes 55-59.

98. For fuller, though differing, accounts of the factors influencing the choices of legislators, compare JAMES S. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 267-71 (1962) (arguing that legislators vote so as to maximize their individual welfare and that rational legislators “exchange” votes on critical issues in order to increase their overall welfare) with Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1548-51 (1988) (arguing that in a republican system the role of the legislator is not simply to implement existing private preferences, but to subject private preferences and interests to critical scrutiny and “deliberate” to produce the best policy choices for society as a whole).

99. PITKIN, *supra* note 86, at 116-18. This is the consequence some critics imagine would follow from subjecting judicial elections to remediation under the Voting Rights Act. Some version of this theory appears to animate Judge Higginbotham’s dissent in *LULAC*, when he discusses the inapplicability of Section 2 to single-member offices and the inappropriateness of “allocat[ing] judges, and thus judicial decisions, among various groups.” *LULAC Council No. 4434 v. Clements*, 914 F.2d 620,

we are to think of judges as engaging in some kind of “acting for” representation, it will be necessary to elaborate further the ways in which judges divine and respond to constituent views, and constituents assess the performance of elected judges.

One point of departure might be Judge Clark’s special concurrence in *LULAC*.¹⁰⁰ In that opinion, he describes the election process as keeping the state judiciary “accountable to the common sense of the electorate.”¹⁰¹ This vision involves no specific substantive consultation with the electorate, yet it suggests first that a judicial performance of a particular type is owed to the public, and second that elections give the public the occasion to measure and render judgment on that performance. What type of performance might be owed to the voters, and according to what criteria might they assess it? Here, several possibilities come to mind.

First, one might imagine voters’ opinions operating as a kind of weak procedural check on judges’ performance. This seems to be the kind of relationship envisioned by Judge Clark himself. “It is expected that candidates who lack training or a reputation for honesty or sound intellect will not be elected,” he states; “[i]n like manner, those who are indolent, will not decide cases or decide erratically will not be re-elected.”¹⁰² The citizens’ role, in this view, is not to influence the substance of decisions before they are made;¹⁰³ it is to object when—in their decisionmaking or other professional capacities—judges have been so neglectful or unscrupulous as to be unworthy of their power to bind constituents. Judges respond not to the opinions of their constituents, but to a view of judicial professionalism for which electors make them accountable. This view, therefore, emphasizes the “formal” representation implicit in the judge-constituent relationship: the power to bind, with a limited accountability. If there is an active, substantive component to this relationship, it must lie in a different understanding of it.

A second approach might describe voters’ opinions operating as a stronger procedural check on the performance of judges. This kind of

648-50 (5th Cir. 1990) (en banc) (Higginbotham, J., dissenting), *rev’d sub nom.* *Houston Lawyers’ Ass’n v. Attorney Gen.*, 111 S. Ct. 2376 (1991). It is not my vision, however, as I will make clear in the following discussion and in my concluding thoughts on remediation. *See infra* notes 100-14, 119-24 and accompanying text.

100. *LULAC*, 914 F.2d at 632 (Clark, J., concurring).

101. *Id.*

102. *Id.*

103. The one possible exception to this statement is the ambiguous injunction not to decide cases “erratically.” This could be interpreted to be a substantive constraint, barring judges either from deciding cases in a way that is doctrinally inconsistent or displaying favoritism to a party or set of parties to an extent that distorts the substantive decisionmaking process. Read in the context of the rest of Judge Clark’s statement, however, I think it more likely that he intended this criterion to constrain judges from making decisions that amount to stupid bungling or that are facially incomprehensible—a very limited, not fully substantive constraint.

check might begin with Judge Clark's injunction against erratic decision-making and extend to a broader limit described by former Justice Joseph Grodin of the California Supreme Court. Discussing the 1986 retention elections in which he lost his seat, Grodin proposes that voters examine the attitudes of judges toward established precedent or toward other institutions such as the legislature.¹⁰⁴ Judges who deal dismissively with existing precedent or fail to show appropriate deference to broadly popular institutions, such as the legislature, might be judged adversely by the voters they serve.¹⁰⁵ This approach envisions an innovative nexus between voters' opinions and judges' choices: although voters' criteria for evaluation are ostensibly procedural or role-oriented, rather than embodying voters' substantive preferences, they are nonetheless capable of altering judges' substantive decisions. Yet even if this account offers a kind of "acting for" representation that might occur between judges and their constituents, it is not clear that it is a type that is either descriptively plausible or normatively desirable. As a routine matter, this institutional form of scrutiny might be beyond the competence and the interest of a lay electorate. Moreover, when one considers the unconventional institutional relations entered into by the federal courts in order to address such critical issues as school desegregation, reapportionment, and prison reform, one might well ask whether it would be a positive thing for electoral scrutiny—particularly as exercised by a lay electorate—to check such exercises of authority.¹⁰⁶

Another possibility involves a more substantive form of check: making judges accountable, to give an unintended meaning to Judge Clark's words, to voters' "common sense."¹⁰⁷ This expression might convey, first, a kind of background or interstitial normative influence. Judges become familiar with the attitudes and preferences of people in the community that they serve. Although these attitudes condition judges' perspectives at many times without their awareness and without amplification by the electoral mechanism, the need to stand for re-election encourages a more careful

104. See Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1978 (1988) (arguing that focusing on such "objective criteria" enables voters to avoid the difficulty of "get[ting] into the judge's mind").

105. *Id.*

106. Not all commentators share my generally positive view of an institutionally innovative role on the part of federal courts. Compare LARRY W. YACKLE, *REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM* (1989) (detailing strengths and virtually inevitable drawbacks of sustained judicial supervision of constitutional reform) with ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 175 (1970) (criticizing sustained judicial involvement in institutional reform).

107. See LULAC Council No. 4434 v. Clements, 914 F.2d 620, 632 (5th Cir. 1990) (en banc) (Clark, J., concurring) ("The choice seeks to assure the public that the judicial function will be kept accountable to the common sense of the electorate.") (emphasis added), *rev'd sub nom.* Houston Lawyers' Ass'n v. Attorney Gen., 111 S. Ct. 2376 (1991).

attention to such attitudes. Because many judges would balk at even a mental consultation of their constituents' views in the general run of cases, judges who are elected might immerse themselves in such opinions¹⁰⁸ hoping that those views could influence judicial decisionmaking in an atmospheric or pre-deliberative way.

This theory of indirect substantive influence might be taken one step further. Internal consultation with the views of the electorate is not always off limits for judges. Many difficult judicial decisions involve "an inevitable element of subjectivity" or "some sort of value judgment for their resolution."¹⁰⁹ In the most visible or controversial of these decisions, voters will develop strong opinions about how these value judgments should be made; in others, the common fabric of their lives will shape opinions they may be only partially conscious that they hold. Even unelected judges may advert to these opinions—at or below the level of conscious choice—as the Court's struggles with issues from abortion¹¹⁰ to obscenity¹¹¹ suggest. State judges have many more occasions to consult such perspectives: not only in the controversial realms of civil rights and criminal cases, but in many common-law areas where judges are obliged to take the perspective of the "reasonable" person or professional (a perspective sometimes specific to location)¹¹² or consult "community standards."¹¹³ Elected state court judges are likely to follow popular opinions regarding such issues more closely.¹¹⁴ This attention to

108. Judges might gain such exposure, for example, through the minute observation of their communities, firsthand and through the media, through appearances in public fora, and through the assiduous tracking of local political disputes.

109. Grodin, *supra* note 103, at 1977.

110. *Cf. Webster v. Reproductive Health Services*, 492 U.S. 490, 535 (1989) (Scalia, J., concurring) ("Alone sufficient to justify a broad holding is the fact that our retaining control, through *Roe*, of what I believe to be, and many of our citizens recognize to be, a political issue, continuously distorts the public perception of the role of this Court. We can now look forward to at least another Term with carts full of mail from the public, and streets full of demonstrators, urging us—their unelected and life-tenured judges who have been awarded those extraordinary, undemocratic characteristics precisely in order that we might follow the law despite the popular will—to follow the popular will.").

111. *See, e.g., Miller v. California*, 413 U.S. 15, 32-34 (1973) (upholding state laws requiring jurors to apply "contemporary community standards" in defining whether pornographic material is legally obscene).

112. A wide array of tort cases, for example, require such an assessment; medical malpractice cases may require a location-specific assessment of the level of care provided by the "reasonable practitioner." *See Hall v. Hilbun*, 466 So. 2d 856, 872 (Miss. 1985) ("Conformity with a local medical custom may be one factor suggesting that a physician has fulfilled his obligation of care.").

113. This type of standard is applied in state-law obscenity cases. *See, e.g., State v. Russland Enters.*, 555 So. 2d 1365, 1368 (La. 1990). Community standards might also be taken into account in determining whether conduct was "outrageous" for purposes of evaluating a claim of intentional infliction of emotional distress. *See, e.g., Koenig v. City of Dayton*, 502 N.E.2d 233, 236-37 (Ohio Ct. App. 1985).

114. Judge Grodin acknowledges that during the 1986 retention campaign he could not be sure that his decisions (including one that affirmed the imposition of the death penalty) were not affected by his

constituent opinions, which may not be formally expressed and is rarely directed toward judges, may be one way in which judges engage in substantive, "acting for" representation. Citizens may not seek correspondence in every decision, but rather watch for consistent conflict between their perspectives and the substantive choices of their elected courts. Judges, on their part, become alert to the attitudinal atmospherics of their jurisdictions, in order to prevent such consistent conflict from emerging. There are surely cases in which judges adhere to legal or moral principle, even when it is unpopular with constituents.¹¹⁵ But in the general run of cases, this degree of correspondence would seem to be descriptively accurate, a consequence of the interplay between electoral selection and the more insular legal obligations of the judicial role. And if such a relationship is likely to emerge where judges are elected, the question in the context of Voting Rights Act jurisprudence is not so much whether it is normatively optimal¹¹⁶ as how it can be made normatively acceptable. I address this question in the following section.

C. *Minority Voters and the Representative's Community*

The foregoing discussion highlights the kinds of relationships that might emerge between nonlegislative officials and the voters who elect them. These relationships would differ from those between legislators and their constituents. They would not involve the minute responsiveness that arises from face-to-face interaction; in the judicial case, public preferences would be divined with little direct constituent contact. These preferences

awareness of their impact on his electoral chances. See Grodin, *supra* note 103, at 1980. Judge Otto Kaus also stated publicly that he could not be sure whether his vote on an important case in 1982 was influenced "subconsciously" by his awareness that his decision could affect his chances in that year's retention elections. See Philip Hager, *Kaus Urges Reelection of Embattled Court Justices*, L.A. TIMES, Sept. 28, 1986, Part I, at 3. Kaus's use of the term "subconsciously" probably means that he attempted to exclude electoral factors from his mind but was not sure that he succeeded. If judges are influenced by constituent views on questions like the constitutionality of the death penalty, where the law directs judges to adhere to precedent and principle, they must attend even more closely to constituent views on that range of matters where the law directs judges explicitly to consult such opinions.

115. Many observers regarded the death penalty cases over which California Chief Judge Rose Bird and Associate Justices Grodin and Reynoso lost their retention elections as such an example. See, e.g., Erwin Cherminsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985, 1986-87 (1988) (describing a pre-election media campaign in which a vote against these judges was characterized as a vote for the death penalty).

116. Views of the normative desirability of the relationship sketched above will vary, depending both on one's opinion of electing judges and on one's opinion of whether judicial decisionmaking should be influenced by the electoral mode of judicial selection. I tend to view judicial election as desirable, if judges can achieve the more complex view of "community" preferences I describe in subpart II(C). But in the context of second-generation Voting Rights Act cases, the electoral selection of judges must be taken as a given; the question, which I address in subpart II(C), is how judges can be made responsive—in the subtle, atmospheric sense described above—to the range of opinions within their constituencies, including those that have been submerged through entrenched discrimination.

would be given effect not within a marketplace of legislative compromise or a process of political deliberation, but through the discretion available in the application or interpretation of the law. But, however episodic or indirect the mechanisms of constituent contact, these relationships would entail responsiveness and accountability to a voting public, which would color or discipline official decisionmaking.

Given these similarities and differences, one must consider a final question. While it is possible to describe a set of relationships that might exist between judges and the voters who elect them, are such relationships appropriate for protection under the Voting Rights Act? In the legislative context, as discussed above, the Act protects this relationship as a means of vindicating not only the formal political participation but also the substantive interests of minority voters.¹¹⁷ It protects the relationship that might be established between elected officials and minority voters because minority voters' preferences may be different from those of white voters and subject to submersion under long-standing circumstances of white political control.¹¹⁸ One might question how this analysis translates to the nonlegislative context. Though the substantive influence of constituent preferences may be significant, notwithstanding its atmospheric character, are minority perspectives distinct enough to justify coverage under Section 2, or 5, of the Act? Are nonlegislative elections distinguishable because judges and prosecutors—to the extent they reflect popular views—speak only for the community as a whole, and not for particular segments or individuals?¹¹⁹

There are good reasons for rejecting the latter view. First, one might well question what it means for a judge to speak for the community as a whole. This characterization obscures the fact that most “communities” are made up of distinct segments with starkly differing perspectives.¹²⁰ Furthermore, there is not only a descriptive error, but a potentially oppressive politics implicit in the suggestion that a community can be represented as a unitary whole. Feminists and critical race scholars have

117. See *supra* notes 52-53 and accompanying text.

118. See Abrams, *supra* note 6, at 450, 478 (positing that the unique histories, cultures, and contemporary experiences of minority groups give them a political vision which may be different from that of whites, particularly under conditions of racial polarization, and that vestiges of past discrimination serve as barriers to the full political expression of minority groups).

119. Judge Johnson makes this point with respect to a range of nonlegislative officials in his *LULAC* dissent. *LULAC Council No. 4434 v. Clements*, 914 F.2d 620, 654 (5th Cir. 1990) (Johnson, J., dissenting) (en banc), *rev'd sub nom.* *Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376 (1991).

120. Interestingly, the process of jury selection—in its goal of producing a “cross-section” of the community—comes closer to the understanding that a community's views are not unitary but multiple and conflicting. See Brief for Petitioners at 59-60, *Chisom v. Roemer*, 111 S. Ct. 2354 (1991) (No. 90-9757) (noting judicial recognition of the importance of jury participation by diverse groups to capture the rich diversity of human nature and experience).

argued forcefully that such unitary constructions often universalize the views of the dominant or more powerful segments of the population while submerging those of less privileged groups.¹²¹

Second, the evidence of racial polarization that is a predicate for recovery in most voting rights cases suggests that such divergence of opinion on the basis of race is more than a theoretical possibility.¹²² Racial polarization evidence suggests not only that members of different racial groups vote for different candidates but also that they are likely to have differences in substantive perspectives.¹²³ These differences are pervasive enough that, if judges were alert to them, they would surely shape the background landscape of opinions that judges brought to decisionmaking. They would also be likely to emerge regarding the many controversial or discretionary decisions—from crime control to zoning to the constitutionality of public school finance schemes—where voters' opinions are likely to have a more particularized influence.¹²⁴

121. See María C. Lugones, *On the Logic of Pluralistic Feminism*, in *FEMINIST ETHICS* 35, 38, 43 (Claudia Card ed., 1991) (criticizing white feminist scholars who acknowledge the "problem of difference" but who merely disclaim any universal application of their theories rather than integrating women's plurality into the structure of their theories); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 582-83 (1990) (stating that the "unified and universal voice" in the United States Constitution speaks only for a political faction that maintains power by silencing contradictory voices); Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 *HARV. L. REV.* 10, 33 (1987) (arguing that those "who have had power to construct legal rules and social arrangements also influence and reflect the dominant cultural expressions" and that "a perspective asserted to produce 'the truth' . . . will obscure the power of a person attributing a difference while excluding important competing perspectives").

122. For more complete discussion of the pervasiveness of racial polarization in the political realm, see Guinier, *supra* note 41, at 1121-23 (noting that "[n]umerous court decisions, anecdotal reports, surveys, and scholarly studies have confirmed the existence of racial bloc voting"); Issacharoff, *supra* note 52, at 1854 (stating that "[r]acial bloc voting is a prominent feature of American politics," as evidenced by Jesse Jackson's presidential campaigns in 1984 and 1988, David Duke's campaign for governor of Louisiana, consolidated white support for the Republican Party, and the racial imagery of the Willie Horton ads).

123. See Issacharoff, *supra* note 52, at 1877-78 (pointing to the differing socioeconomic positions of white and black Americans as a possible explanation for the persistence of racially polarized voting).

124. My point here is not to suggest that all members of particular racial minority groups have similar perspectives on questions of political importance, or that a legacy of discrimination—according to race, gender, or any other immutable characteristic—shapes the consciousness or political perspectives of all group members in the same way. I disagree with both of these propositions. Compare Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 *STAN. L. REV.* 807, 813, 814, 810-19 (1993) (summarizing the claims of "different voice" scholars who describe "the" female voice as one of "context and connection" and noting that although many scholars argue for "a distinct voice of color," there has thus far been little exploration of the content of such a voice (emphasis added)) with Kathryn Abrams, *Hearing the Call of Stories*, 79 *CAL. L. REV.* 971 (1991) and Kathryn Abrams, *Unity, Narrative and Law*, 13 *STUD. L., POL. & SOC.* (forthcoming 1993) (both arguing for discernment and amplification of a pluralism of voices within gender and racial groups). My point is that, particularly in those voting rights contexts where claimants allege racial polarization, differences in substantive preferences between minorities and whites are likely to arise with sufficient frequency and have sufficient importance that insisting on official responsiveness to "the community as a whole" is likely to be unrealistic and dilutive of minority political influence.

Finally, the fact that popular influence over judicial decisionmaking is less often direct than atmospheric does not militate against protection of racial minorities in this context. The persistent inability to elect representatives on whom one can explicitly press one's substantive views—the disadvantage that racial minorities have suffered in the legislative context—is one legacy of political oppression and exclusion. But it is just as much the mark of political marginalization that the perspectives of a group are erased from or submerged within that body of “community opinion” from which nonlegislative officials take their bearings.¹²⁵ The Voting Rights Act must address this second legacy of discrimination as surely as it must address the first. Only by becoming alert to these dynamics in the formation of political opinion can judges fairly “act for” the citizens of their communities. The Voting Rights Act can help accomplish this goal by structuring the political arena so that officials can hear these persistently submerged voices.

III. Conclusion

This effort to describe relationships of representation that continue after election day, and exist beyond the legislative realm, is only the first step in addressing the next generation of voting rights challenges. It does not address the questions that Voting Rights Act coverage inevitably entails: questions of remediation.¹²⁶ It is not at all clear, for example,

125. Many feminists and critical race theorists describe erasure of one's experiences and perspectives as one of the most invidious consequences of systematic oppression. See generally ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988) (discussing the way in which nondominant women's perspectives are erased through unitary presentation of women's experience); ADRIENNE RICH, *Compulsory Heterosexuality and Lesbian Existence*, in *BLOOD, BREAD, AND POETRY: SELECTED PROSE 1979-1985*, at 23, 23 (1986) (discussing the erasure of lesbian existence in feminist work).

Making a related point, Justice Marshall argued that the abstraction increasingly employed by the Court in equal protection cases erased the facts of the lives of minority citizens from the Court's jurisprudence. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 530 (1989) (Marshall, J., dissenting). In a tribute that nicely underscores the need for racial diversity on the bench, Justice O'Connor recently argued that one of Justice Marshall's most important contributions was to offer the stories that made the details of oppressed groups' lives present to the Justices of the Court. See Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 *STAN. L. REV.* 1217 (1992).

126. Whether the Court that authored *Shaw* would disapprove districts intended to amplify the historically submerged voices of minority citizens remains an open question. On the one hand, this goal has a more attenuated connection to political “results” and creates less of a zero-sum game between groups of voters than the remedies with which the pre-*Shaw* line of constitutional cases has been concerned. See, e.g., *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (minority set-asides for municipal contractors); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (formula for preserving employment for minority teachers during district-wide layoffs). On the other hand, *Shaw* speaks quite broadly of the evils of classifying citizens by race for purposes of political participation. *Shaw v. Reno*, 113 S. Ct. 2816, 2827-28 (1993) (race-conscious districting fosters separatism, leads elected officials to think they represent only members of a particular racial group, and encourages racial bloc

that remedial approaches devised for the legislative context will be suitable for nonlegislative officials. My own suggestion that remedial authorities construct "strong plurality" districts that will encourage interracial coalition building¹²⁷ makes little sense in contexts where proponents of competing perspectives rarely engage in overt efforts to exercise influence. The dominant remedial strategy of creating single-member, supermajority districts also has drawbacks quite apart from the potential barriers erected by *Shaw*: although it offers a means of amplifying submerged minority perspectives, in the context of collegial bodies,¹²⁸ it also fuels the erroneous perception that nonlegislative representation should have a "descriptive" character.¹²⁹ This area may be ripe for cumulative voting and other remedial schemes that amplify perspectives that enjoy substantial, though less than majority, support,¹³⁰ it might also be suitable for remedial pluralism, given the variety of state selection schemes and the different criteria that might be used in the evaluation of nonlegislative representatives.

The full elaboration of these remedial issues must, of course, await another day. My point has been to begin the predicate inquiry: to suggest that focusing on relationships of representation—relationships that yield substantive influence to constituents of elected officials—captures a measure of political participation of which all may not avail themselves, but to which all should be entitled.

voting). On an optimistic interpretation of *Shaw*, however, such considerations might be rendered moot by a showing that a Section 2 violation with respect to the election of judges had already occurred.

127. See Abrams, *supra* note 6, at 520-31.

128. Remedies where the officials in question hold single-member offices will be dependent on the action of the courts regarding the "single-member office" exception. See Karlan, *supra* note 52, at 187 n.54 (arguing that a majority vote requirement for single-member offices may alter the outcome of elections in jurisdictions with a cohesive numerical minority and a fractionalized majority, and noting the refusal of the courts to apply § 2 vote dilution principles to this situation).

129. See *supra* text accompanying note 99.

130. See Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1617 (1993) (arguing that the use of semiproportional voting systems, such as cumulative voting, would encourage voters to form shifting coalitions based on the voters' own perception of their interests or their group identity). The surprising and ill-handled controversy over the nomination of Guinier to head the Civil Rights Division suggests that large segments of the American public—including the present administration—may need to be educated concerning the virtues of such approaches, and their consonance with some principles of American democratic theory, before they can successfully be implemented.

